NOTES

THE MIRACULOUS RAISING OF LAZARUS: *McKAIN v R W MILLER & CO (SOUTH AUSTRALIA) PTY LTD*

P E NYGH*

INTRODUCTION

The decision of the High Court in *Breavington v Godleman*[1] in 1988 was hailed at first as marking a fundamental change in Australian conflicts law. It suffered, like many judgments of the High Court, from the fact that seven judges managed to produce six judgments, some of which were in sharp disagreement with each other although all concurred in the same result. But, at least to academic observers,[2] it was possible to discern a majority composed of Chief Justice Mason and Justices Wilson, Gaudron and Deane. This majority seemingly agreed with the following propositions put forward by the Chief Justice:

1. That as between Australian jurisdictions, the common law choice of law rules developed in relation to international conflicts should *not* be applied automatically but should be modified to take account of the basic homogeneity or similarity in the common law and the statute law

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1. (1988) 169 CLR 41.
2. P E Nygh *Conflict of Laws in Australia* 5th edn (Sydney: Butterworths, 1991) 234, 235; E I Sykes and M C Pryles *Australian Private International Law* 3rd edn (Sydney: Law Book Company, 1991) 565.

in force in the various Australian states and territories. The aim should be to ensure that there would be uniformity of outcome no matter where in Australia a matter is litigated.[3]

2. That the celebrated conditions relating to the choice of law in tort, first formulated by Judge Willes in *Phillips v Eyre*[4] and subsequently applied by the High Court in *Koop v Bebb*[5] and *Anderson v Eric Anderson Radio and TV Pty Ltd*,[6] should no longer be applied to intra - Australian litigation, but should be replaced by a simple rule referring questions affecting liability to the law of the place of wrong only, subject to a possible "flexible exception".[7]

The concurrent application of the law of the forum, which had been retained by the House of Lords in *Chaplin v Boys*,[8] was specifically rejected by Chief Justice Mason in *Breavington v Godleman* as presenting "a needless complication".[9] With this basic "one law approach", which excluded any effective role for the law of the forum, Justices Wilson, Gaudron[10] and Deane[11] agreed.

The other three (minority) judges in *Breavington v Godleman*[12] (Justices Brennan, Dawson and Toohey) arrived at the same conclusion that the law of the place of wrong was determinative. In effect they applied the rule in *Phillips v Eyre*,[13] as re-interpreted by Lord Wilberforce in *Chaplin v Boys*,[14] namely, that in relation to a foreign tort, there should be "actionability as a tort according to English law, subject to the condition that civil liability in respect of the relevant claim exists as between the actual parties under the law of the

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3. (1988) 169 CLR 41 Mason CJ, 77-79. See also: Australian Law Reform Commission, Choice of Law (Report No 58 1992) para 1.15 ("ALRC Report"). His Honour did not, it is true, share the view expressed by Deane J (ibid, 136, 137) and to some extent shared by Wilson and Gaudron JJ (ibid, 90), that s 118 of the Australian Constitution (the "full faith and credit" clause) mandated such an approach. (See further: P E Nygh "Full Faith and Credit: A Constitutional Rule for Conflict Resolution?" (1991) Sydney Centenary Essays in Law, 183).
4. (1870) LR 6 QB 1, 28-29.
5. (1951) 84 CLR 629.
6. (1965) 114 CLR 20.
7. (1988) 169 CLR 41, 76-77. The "flexible exception" was proposed by Lord Wilberforce in *Chaplin v Boys* [1971] AC 356, 391-392.
8. [1971] AC 356.
9. (1988) 169 CLR 41, 77.
10. Ibid, 99.
11. Ibid, 136.
12. Supra n 1
13. Supra n 4.
14. [1971] AC 356, 389.

foreign country where the act was done".[15] It should be noted, however, that this interpretation leaves open a concurrent role for the law of the forum: it must concur in granting a remedy for the wrong committed abroad and it must impose a liability which at the very least is equal to that imposed by the law of the place of wrong. If the forum denies relief,[16] or imposes a lesser liability, the plaintiff cannot recover more. This also means that the extent of relief will vary depending on the Australian forum chosen by the plaintiff.[17] Despite the acceptance of the Wilberforce interpretation, two of the three minority judges rejected the flexible exception which had been part and parcel of his Lordship's conclusion in *Boys v Chaplin*.[18] Only Justice Toohey saw merit in its application in appropriate, albeit rare, circumstances.[19]

Academic writers celebrated the demise of *Phillips v Eyre*[20] and the start of a new era in Australian conflicts law.[21] But it was not merely an academic mirage. The conclusion that, following *Breavington v Godleman*,[22] the rule in *Phillips v Eyre*[23] was a dead-letter in conflicts within the Australian federation was drawn by the New South Wales Court of Appeal in *Australian Broadcasting Corporation v Waterhouse*.[24] If there was any doubt about the decision of the majority in *Breavington v Godleman*,[25] that view was clearly restated by Chief Justice Mason at the start of his judgment in *McKain v R W Miller (South Australia) Pty Ltd* ("*McKain*").[26]

This background makes the reasoning of the majority in *McKain*[27] all the more astonishing. On its facts the case raised an important issue which had been left open in *Breavington v Godleman*,[28] namely, to what extent the determination of the liability of the defendant and the law of the place of

15. (1988) 169 CLR 41 Brennan J, 111; Dawson J, 146; Toohey J 160-161.
16. *Anderson v Eric Anderson Radio and TV Pty Ltd* (1965) 114 CLR 20.
17. Ibid.
18. (1988) 169 CLR 41 Brennan J 113; Dawson J, 147.
19. Ibid, Toohey J, 163.
20. Supra n 4.
21. See Nygh supra n 2, 324, 325; Pryles, "The Law Applicable to Interstate Torts: Farewell to Phillips v Eyre?" (1989) 63 ALJ 158, especially at 181.
22. Supra n 1.
23. Supra n 4.
24. (1991) 25 NSWLR 519. See also; *Byrnes v Groote Eylandt Mining Co Pty Ltd* (1990) 93 ALR 131 Kirby P, 139-140; Hope AJA, 149. Other cases in which this conclusion was drawn are: *Waterhouse v ABC* (1989) 86 ACTR 1, 19; *Amor v Macpak Pty Ltd* (1989) 95 FLR 10, 12-13; *Anglo-Australian Foods v Von Planta* (1988) 20 FCR 34, 38-39.
25. Supra n 1.
26. (1991) 174 CLR 1, 14. See also; ibid Deane J, 45; Gaudron J, 54.
27. Ibid.
28. Supra n 1.

wrong could be affected by the *procedural* law of the forum. It had been acknowledged by the majority in *Breavington v Godleman*[29] that matters of procedure should remain governed by the law of the forum with one key qualification. The Northern Territory's Motor Accidents (Compensation) Act 1979, which was the place of wrong in *Breavington v Godleman*, limited recovery to a maximum of one hundred thousand dollars. It was argued that this rule was a matter going to assessment of damages, which was a question of procedure to be governed by the law of Victoria as the law of the forum. Chief Justice Mason rejected that submission saying:

> In reaching the conclusion that, as a matter of conflicts of law, the law of the Northern Territory is to be applied, I reject the notion that the principles according to which damages for personal injury are to be assessed is a matter of procedure. It would be artificial to regard that question as one of adjectival or procedural law. The measure of damages is plainly a question of substantive law.[30]

With due respect, that proposition is not as plain in English law as the Chief Justice assumed.[31] Nevertheless there was no notable dissent by the other judges from his view.[32]

In *Byrnes v Groote Eylandt Mining Co Pty Ltd*,[33] President Kirby rightly saw that as an indication that "substantive law" should be interpreted broadly to include "those matters which determine whether the plaintiff would recover in the forum where the tort occurred".[34] This would include a statutory provision in the place of wrong imposing a period of limitation on the right to bring action for the recovery of damages.

THE FACTS

In *McKain*,[35] the plaintiff, a resident of New South Wales, had been employed as a merchant seaman on a ship sailing in South Australian waters. Whilst the ship was tied up in Port Lincoln, South Australia, the plaintiff on 22 February 1984 suffered an injury allegedly due to the negligence of the defendant company which was incorporated in South Australia. The plaintiff filed a statement of claim seeking damages for his injuries in the Supreme Court of New South Wales in January 1990. Under section 14(1) of the New

29. (1988) 169 CLR 41 Deane J, 136.
30. Ibid, 79.
31. See *Boys v Chaplin* [1971] AC 356 Lord Hodson, 378-379; Lord Guest, 382-383; Lord Wilberforce, 392-394.
32. (1988) 169 CLR 41 Deane J, 139; Toohey J, 170.
33. (1990) 93 ALR 131.
34. Ibid, 40.
35. Supra n 28.

South Wales Limitations Act 1969 an action may be brought within six years of the date on which the cause of action accrued. Under section 36(1) of the South Australian Limitation of Actions Act 1936 the corresponding period is three years. In addition, the defendant sought to rely on section 82(2) of the South Australian Workers' Compensation Act 1971 which bars the right to bring an action at common law in respect of an injury for which a claim could be brought under that Act, unless commenced within three years from the day on which the injury occurred. The defence that the claim was statute barred was ordered to be tried as a preliminary issue and that trial was removed into the High Court pursuant to section 40(1) of the Commonwealth Judiciary Act 1903.

THE DECISION

The issue before the High Court was therefore a relatively narrow one: are statutes of limitation to be described as part of *procedural* law, governed by the law of the forum, or should they be classified as part of the *substantive* law, in which case the plaintiff's claim would be defeated?

Existing case law supported the proposition that statutes of limitation expressed to relate to the institution of proceedings are generally procedural in nature and hence governed by the law of the forum.[36] There is no doubt that both section 14(1) of the New South Wales Limitations Act 1969 and section 36(1) of the South Australian Limitations Act 1936 fell into that category. There is an exception in the case of a period of limitation which is imposed on the exercise of a right of action created by the same statute;[37] but, on any view, section 82(3) of the South Australian Workers' Compensation Act 1971 imposed a restriction on the exercise of common law rights.

Notwithstanding his own earlier adherence to the basic rule,[38] Chief Justice Mason thought that the time was ripe to reconsider the scope of the law of the forum, at least in intra - Australian conflicts. He said:

> Within the Australian federation, one should have thought that it would not be unduly inconvenient to apply the procedural rules of the law of the cause especially now that, in a slightly different context, there is a statutory precedent for so doing: Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth) section 11 (1) (c). Certainly, in the case of statutes of limitation, it is difficult to see what inconvenience or hindrance would be caused to a forum court in giving effect to the limitation period prescribed by the law

36. *Pedersen v Young* (1964) 110 CLR 162 Kitto J, 166; Menzies J, 166-167.
37. *Maxwell v Murphy* (1957) 96 CLR 261.
38. *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65 Mason J (as he then was), 92-93.

of the cause ....[39]

The Chief Justice would therefore confine the operation of the law of the forum to those provisions which form part of the mechanism or machinery of litigation or are directed to the regulation of the mode or conduct of court proceedings.[40] This proposal has been adopted by the Australian Law Reform Commission in its Report on Choice of Law.[41] Clearly the provisions of the various Limitation Acts fell outside that definition and consequently the Chief Justice upheld the defence. In so doing, he had the support of Justice Deane[42] and (more cautiously) of Justice Gaudron.[43] As discussed earlier, this was in line with the majority view in *Breavington v Godleman*[44] that, at least within the Australian federation, the effect of the law of the forum or of the choice of forum by the plaintiff should be limited so as to ensure similarity of outcome.

Unfortunately the Chief Justice's conclusion was challenged by a new majority in the High Court, Justice McHugh having replaced Justice Wilson upon the latter's retirement. That new majority, consisting of Justices Brennan, Dawson, Toohey and McHugh, in a rare joint judgment, challenged not merely the conclusion but also the premiss. This majority rejected the basic proposition underlying the majority view in *Breavington v Godleman*[45] that a choice of forum should have no significant effect on the liability of a defendant in relation to an Australian tort. This was done despite the fact that the correctness of the decision in *Breavington v Godleman*[46] was not questioned by counsel. All had accepted that the law applicable to determine the substantive liability of the defendant was solely the law of South Australia, as the place of wrong.

Nevertheless the majority's joint judgment in *McKain*[47] accepted as its basic premiss the continued viability of the rule in *Phillips v Eyre*,[48] as re-interpreted by Lord Wilberforce in *Chaplin v Boys*.[49] It endorsed the formula put forward by Justice Brennan in his dissenting judgment in *Breavington v*

39. (1991) 174 CLR 1, 26.
40. Ibid, 27.
41. ALRC Report supra n 3, para 10.8.
42. (1991) 174 CLR 1, 52.
43. (1991) 174 CLR 1, 61 (limited to limitation provisions).
44. Supra n 1.
45. Ibid.
46. Ibid.
47. Supra n 28.
48. Supra n 4.
49. Supra n 11.

Godleman,[50] even though this had not found favour with a majority of judges in that case. Hence the choice of law rule in relation to inter-state torts which now has the support of a majority of justices may be summarised as follows:

> A plaintiff may sue in the forum to enforce a liability in respect of a wrong arising out of the territory of the forum if - (i) the claim arises out of circumstances of such a character that, if they had occurred within the territory of the forum, a cause of action would have arisen entitling the plaintiff to enforce against the defendant a civil liability of the kind which the plaintiff claims to enforce; and (ii) by the law of the place in which the wrong occurred, the circumstances of the occurrence gave rise to a civil liability of the kind which the plaintiff claims to enforce.[51]

To this the majority's joint judgment in *McKain* added the qualification that the civil liability which is being enforced through the law of the forum must be continuing and must not have been extinguished under the law of the place of wrong at the time of the hearing.[52]

It follows that the double-barrelled *Phillips v Eyre*[53] rule has been miraculously raised from its grave, albeit in the modified form which Lord Wilberforce gave it in *Chaplin v Boys*. This was certainly the conclusion drawn by Justice Hunt when that hardy perennial *Waterhouse v Australian Broadcasting Corporation*[54] returned to him from the Court of Appeal, which had somewhat prematurely proclaimed the death of *Phillips v Eyre*.[55] However, Lord Wilberforce's "flexible exception", which Justice Toohey had favoured in *Breavington v Godleman*,[56] was jettisoned by the majority in *McKain*,[57] at least in relation to inter-state torts, for the sake of certainty.[58]

It follows that the present majority in the High Court do not see that section 118 of the Australian Constitution compels them to override the common law and statutory choice of law rules of the forum. For that proposition they rightly claim a majority in *Breavington v Godleman*.[59] But this does not give them a majority, as they seem to imply,[60] for the continued operation within Australia of common law rules which favour the forum.[61]

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50. Supra n 1.
51. *Breavington v Godleman* supra n 1, 110-111; repeated in *McKain* supra n 28, 39.
52. (1991) 174 CLR 1, 39.
53. Supra n 4.
54. [1992] ACL Rep 145 NSW 1. See also, *Buckby v Lloyd Aviation Jet Charter Pty Ltd* [1992] ACL Rep 85 SA 5.
55. Supra n 4.
56. Supra n 1.
57. Supra n 28.
58. (1991) 174 CLR 1, 38-39.
59. Supra n 1.
60. Ibid, 35.
61. See Nygh supra n 6, 193-196.

And most certainly there was no majority in *Breavington v Godleman*[62] in favour of the continued operation of the rule in *Phillips v Eyre*.[63]

Since the law of the forum remained sovereign in the view of the majority in *McKain*, it followed that the ancient distinction between rules barring the remedy (which are to be classified as *procedural*) and rules barring the right (which are to be classified as *substantive*) still remains to be applied in intra-Australian conflicts. It follows that, in the view of the majority, the plaintiff could enforce in New South Wales a right which he could no longer enforce in South Australia. Perhaps there is some sociological significance in the fact that the three judges who would have denied the application of New South Wales law all came from that State, whereas the majority of the judges came from other States!

This was, of course, the only issue which the court had to decide. The majority could no doubt have done so merely by reference to a well established line of authority in England and Australia which had hitherto not been questioned judicially. The majority's excursion into section 118 of the Australian Constitution and the rule in *Phillips v Eyre*[64] was therefore gratuitous and obiter.

CRITIQUE

The result leaves the observer somewhat bewildered. The highest appellate court in most common law countries usually takes some care before it reverses a previous decision, especially one only three years old. The High Court has, of course, recently clarified in *Voth v Manildra Flour Mills Pty Ltd*[65] ("*Voth*") the somewhat confusing array of views expressed by individual judges in *Oceanic Sun Line Special Shipping Co Inc v Fay*;[66] and the majority may have thought that *Breavington v Godleman*[67] required a similar explanation. But *Voth*[68] was a consolidation whereas *McKain*[69] is a reversal.

It is true that the remarks of the majority in *McKain*[70] on the resurrection of *Phillips v Eyre*[71] are entirely obiter, but they are a deliberate joint

62. Supra n 1.
63. Supra n 4.
64. Ibid.
65. (1990) 171 CLR 538.
66. (1988) 165 CLR 197.
67. Supra n 1.
68. Supra n 64.
69. Supra n 28.
70. Ibid.
71. Supra n 4.

pronouncement by four out of seven judges of the High Court and it cannot be assumed (unless one of them retires and is replaced by a judge of a different view) that they will abandon it. I do not imagine that future candidates for appointment to the High Court will be tested on their attitude towards *Phillips v Eyre*[72] in the manner of the abortion litmus test in the United States, although a knowledge of private international law will clearly be an advantage. However, I cannot but recall the admirable restraint shown by Justice Gibbs (as he then was) in *Queensland v Commonwealth*[73] when, despite a change in the personnel of the High Court, he refused to apply his personal view that a recent decision of that court should be overruled. As his Honour appreciated, decisions made by transient or accidental majorities do little to enhance the reputation of the court.

Furthermore I believe that the majority judgment in *McKain*[74] is wrong in principle, both in relation to the continued operation of the rule in *Phillips v Eyre*[75] and in relation to the tortuous delimitation between laws which bar the right and those which bar the remedy first laid down in 1835 in *Huber v Steiner*.[76] These rules have no place in modern law.

There is no logical reason for the double-barrelled rule in *Phillips v Eyre*.[77] One could, if one was of the view that the law of the forum offered the best remedy, extend its benefits altruistically to the rest of the world, as the New South Wales Court of Appeal did in *Kolsky v Mayne Nickless Ltd.*[78] Conversely, one could, as did the majority in *Breavington v Godleman*,[79] make a logical case for applying the law of the place of the tort. One might even, in a fit of generosity, offer the plaintiff a choice between the two! But to make the plaintiff jump through two hoops seems absurd.[80]

It might be argued that the rule in *Phillips v Eyre*[81] is of such antiquity that a court (even of the eminence of our High Court) should not disturb it. Although the formula dates from 1870 its meaning has been disputed ever since.[82] In England the scope of the rule was not settled until 1971 when Lord

72. Ibid.
73. (1977) 139 CLR 585, 599-600.
74. Supra n 28.
75. Supra n 4.
76. (1835) 2 Bing (NC) 202, 210-211.
77. Supra n 4.
78. [1970] 3 NSWR 511.
79. Supra n 1.
80. For the lamentable consequences of such a rigid approach, see the Scots cases of *M'Elroy v M'Allister* 1949 SC 110; *Mitchell v McCulloch* 1976 SLT 2.
81. Supra n 4.
82. See G C Cheshire and P M North, Private International Law 12th edn (London:

Wilberforce, arguably the last of the great common law judges, engaged in an act of judicial legislation. But even Homer has been known to nod. In any event, the majority in *McKain*[83] engaged in its own act of judicial legislation by accepting the main Wilberforce formula, though shorn of its essential companion - the flexible exception.

In relation to the right/remedy dichotomy, admittedly authority is stronger and there is no history of confusion and dissent as with *Phillips v Eyre*.[84] But it is hard to disagree with Chief Justice Mason when he said in his dissent that this dichotomy:

> [D]eveloped in the context of transnational rather than intranational disputes such as occur within a federation. The tendency developed at a time when the importance of international judicial comity may not have been given the same recognition it nowadays commands ... and when the notion of forum shopping was not considered as objectionable a practice as it now is ... In contrast to the first edition, the eleventh edition of *Dicey and Morris* notes that, in general, the practice of giving a broad scope to the classification of a matter as procedural has fallen into disfavour because of its tendency to frustrate the purposes of choice of law rules ... Moreover, the rationale behind the change - that choice of law rules should operate to fulfil foreign rights - is in conformity with the approach of the majority of this Court in *Breavington v Godleman*[85] in the context of interstate torts.[86]

A High Court which has happily changed course on several occasions in its interpretation of section 92 of the Australian Constitution, with considerable effect on the politics and economy of the nation, could surely pick up sufficient courage to abandon some useless 19th century English baggage which even the United Kingdom has now jettisoned, albeit by statute.[87] If it cannot or will not do this, the Standing Committee of Attorneys General should give urgent consideration to the legislation proposed by the Australian Law Reform Commission in its Report on Choice of Law. This would provide that the law of the place of wrong will govern liability in tort, subject to a flexible exception,[88] and any rule of procedure which affects the outcome is to be treated as part of the substantive law governing the cause.[89]

Butterworths, 1992) 539-549.

83. Supra n 28.
84. Supra n 4.
85. Supra n 1.
86. (1991) 174 CLR 1, 22-23.
87. (UK) Foreign Limitation Periods Act 1984.
88. ALRC Report, supra n 3, para 6.27.
89. Ibid, para 10.13.